Supreme Court, U.S.
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No. 92-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,
Petitioner,

v.

GEORGE H. MITCHELL and CAROL J. MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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United States Code, Title 11

Section 506. *Determination of secured status*

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Section 1322. *Contents of plan*

. . .

(b) Subject to subsections (a) and (c) of this section, the plan may—

. . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims

Section 1325. *Confirmation of plan*

(a) Except as provided in subsection (b), the court shall confirm a plan if—

. . .

(5) with respect to each allowed secured claim provided for by the plan—

. . .

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim . . . .

REASONS FOR DENYING CERTIORARI

1. 11 U.S.C. § 506(a) does not authorize the adoption of a uniform nationwide approach to valuing all secured claims, as proposed by GMAC.

GMAC, in its Petition for Writ, p. 5, states correctly that "collateral must be valued for many different purposes in bankruptcy, including confirmation and implementation of reorganization plans, motions for relief from stay, applications for use of cash collateral, and redemption." All of these are among the many possible "purposes of the valuation" referred to in 11 U.S.C. § 506(a).

For each "purpose" of a valuation, a court may find a different method of valuation appropriate for the circumstances involved. A method of valuation for one purpose may not be appropriate in another context.

The legislative history reaffirms the meaning of § 506(a) in this regard.

> Additionally a determination of what portion of an allowed claim is secured . . . is binding only for the purpose for which the determination is made. Thus determinations for purposes of adequate protection is not binding for purposes of "cram down" . . .
> (124 Cong. Rec. H 11095, H 11111, H 11112 (Sept. 28, 1978).

> While courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property . . . To illustrate, a valuation early in the case in a proceeding under sections 361-363 would not be binding upon the debtor or creditor at the time of confirmation of the plan.
> (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 68.).

GMAC does not recognize the complex nature of the process by which secured claims are valued under the Bankruptcy Code. GMAC strongly implies that the Ninth Circuit's decision in this case applies across-the-board to all situations involving the valuation of secured claims. (Petition for Writ, pp. 5-9). GMAC urges this Court to adopt "a uniform, national approach to valuing collateral in bankruptcy" (Petition for Writ, p. 9). No such "uniform" approach is possible, in light of the wording of the statute and its legislative history.

The Ninth Circuit's decision in this case applies only to the valuation of secured claims for the purpose of confirmation of a Chapter 13 plan pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii). It does not apply to valuations for other purposes in Chapter 13 cases, such as a § 109(e) evaluation, or a § 363 motion for sale, use or lease of property. And,

there is no justification for asserting that the Ninth Circuit's decision applies to cases under other chapters.

2. **There is no conflict between the Ninth Circuit's decision in this case and decisions of other Circuits and this Court's decisions.**

GMAC cites numerous cases which are claimed to be in conflict with the Ninth Circuit's decision in this case. It is important to note that a large percentage of reported bankruptcy cases are *non*-Article III trial court decisions — below even the level of U.S. District Courts.

Most of these cases do not, in fact, conflict with the Ninth Circuit's decision. Most of the cases can be differentiated by the purpose of the valuation or type of bankruptcy relief involved (eg. Chapters 7, 11, 12, 13).

a. **The Ninth Circuit's decision in this case does not conflict with the Fourth Circuit's decision *In re Balbus*, 993 F.2d 246 (4th Cir. 1991).**

GMAC asserts that the Ninth Circuit's decision in this case conflicts with the Fourth Circuit's decision in *In re Balbus*. Since this is the only other circuit court of appeals to even remotely touch on the same issue, GMAC stretches to find a conflict.

Such a conflict simply does not exist. *In re Balbus* was a Chapter 13 case in which the issue of the valuation of secured claims arose under a determination of the debtor's eligibility as a Chapter 13 debtor pursuant to 11 U.S.C. § 109(e). The secured creditor argued that the debtor had more than the $100,000 jurisdictional limit of unsecured debt for Chapter 13 cases. The secured creditor arrived at this calculation by arguing that costs of sale should be deducted from the value of the securing assets, in order to shift more of the total debt into the unsecured category and disqualify the debtor for Chapter 13 protection.

The Fourth Circuit rejected the creditor's attempt to disqualify the Chapter 13 debtor and addressed § 506(a) in that context. By no means is the purpose of a § 109(e) evaluation at all similar to the purpose of determining compliance with § 1325(a)(5)(B)(ii) in confirming a Chapter 13 plan. In *In re Balbus*, no decision was made as to the amount that would be paid the holder of the secured claim through the plan.

Different methods of valuing secured claims in § 109(e) evaluations and § 1325(a)(5)(B)(ii) can comfortably co-exist not only between different circuits—but even within the same circuit.

b. The Ninth Circuit's decision in this case does not conflict with this Court's decision in *Dewsnup v. Timm*, ____ U.S. ____, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Dewsnup has little or no applicability to the Mitchells' case. The *Dewsnup* case was a Chapter 7, while the Mitchells filed a Chapter 13. In Chapter 13 cases, 11 U.S.C. § 1325(a)(5)(B)(ii) and § 1322(b)(2) govern the treatment of fully or partially secured claims, such as GMAC's. The sections are clear, and the legislative history surrounding § 1325(a)(5)(B)(ii) is completely different from § 506(d). Section 1325(a)(5)(B)(ii) invokes § 506(a) in valuing secured claims, but does not refer to or rely upon § 506(d) regarding the voiding of liens.

Apparently, in large part due to the confusing scenarios offered by the parties, this Court was unwilling to apply its result in *Dewsnup* beyond the facts presented:

> Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.
> *Dewsnup v. Timm*, at 778.

GMAC asserts that this Court, in *Dewsnup v. Timm*, ruled that "a secured creditor's interest extends beyond the right of immediate foreclosure, to encompass, at a minimum, the right to recover future appreciation of the collateral as well." (Petition for Writ, p. 17). GMAC argues that the Ninth Circuit's decision in this case conflicts with this purported rule of *Dewsnup*.

The Mitchells believe that the reference to the mortgagee's claim to appreciation was not intended by this Court to be interpreted as a "Rule" to be applied to all chapters of the Bankruptcy Code and to all fact situations. The Mitchells believe that this reference in *Dewsnup* has been taken completely out of context by GMAC and is not relevant to this case currently before this Court.

In addition, the security in question is an automobile — and most automobiles (including the Mitchells') do not appreciate. Therefore, GMAC's assertion that the Ninth Circuit's decision would necessarily deprive lienholders of appreciation is without merit.

GMAC states (Petition for Writ, p. 17):

> Under the Ninth Circuit's interpretation, a day after confirmation of a cram-down plan, a debtor could pay its creditor the wholesale value of its collateral, then sell the collateral at its retail value and pocket the difference — about $3,500 in this case.

This assertion is demonstrably false. First, the debtors would never be able to sell the vehicle for "retail" value, as that term was used by the Ninth Circuit and the Bankruptcy Appellate Panel. "Retail" value in this context, includes the overhead and profit of a used car dealer. A private party would not normally be able to achieve such a high price because an individual would not have the assistance of a trained used car salesman and the advertising budget of a dealer. Therefore, an individual would obtain a lower than "retail" sales price.

Second and even more important is GMAC's failure to

take into consideration the provisions of 11 U.S.C. § 363. The Chapter 13 debtor would move for permission to sell the vehicle pursuant to § 363. The formerly-secured creditor would be noticed along with other creditors and would be able to object to the distribution of sale proceeds to the debtor, and potentially re-value its secured claim. 11 U.S.C. § 506(a) clearly envisions valuations in the context of § 363 motions, and provides for these valuations to differ from valuations in other contexts. GMAC does not recognize this flexibility Congress built into § 506(a).

c. The Ninth Circuit's decision in this case is consistent with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

In *Timbers of Inwood*, this Court found that an undersecured creditor such as GMAC does *not* have the right of immediate foreclosure or repossession for which it must be *additionally* compensated if the debtor retains the secured asset. This Court found that the secured creditor is entitled to adequate protection (which may be in the form of periodic payments on the principal or insurance, etc.), but that additional compensation for being prevented from foreclosing on the asset, the "use value," is *not permissible*.

In essence, that is what GMAC is demanding in this case. GMAC is saying that the debtors should pay and the creditor is entitled to receive money in addition to what GMAC would receive if it repossessed the vehicle, simply because the debtors are retaining the vehicle. GMAC describes it slightly differently, but that is what GMAC is requesting: *additional* compensation for being prevented from repossessing the vehicle.

GMAC creates the appearance of a conflict with this Court's decision in *Timbers of Inwood*, only by citing passages completely out of context. There is no conflict between the

Ninth Circuit's decision in this case and the decision of this Court in *Timbers of Inwood*.

d. **Many cases cited by GMAC as being in conflict with the Ninth Circuit's decision involve disparate fact situations which distinguish the results from those in this case.**

To analyze each of the 70 lower court decisions listed by GMAC in its Appendix would unnecessarily burden the reader as well as the writer. The vast range of actual issues addressed, types of secured property, purposes for the valuation, and chapters of the Bankruptcy Code, create a mosaic of case law — most of which is surprisingly *not* inconsistent.

An example of a case improperly cited by GMAC as conflicting with the Ninth Circuit's decision in this case is *In re Courtright*, 57 B.R. 495 (D.Ore. 1986). This decision is difficult to analyze primarily because it does not disclose what chapter of the Bankruptcy Code the debtors filed under, nor does the court state the purpose of the valuation. Therefore, the results of this decision are of limited value since without knowing the context of the case, it can only be cited out of context.

GMAC claims that "uncertainty" regarding secured claim valuation methods is costing the "financially strapped debtor and its creditors" (Petition for Writ, p. 6) unnecessary attorneys fees. The Mitchells disagree with this claim. The Mitchells argue that there is relatively little "uncertainty" about the valuation process, as evidenced by the fact that this is the first case to be decided by a Circuit Court. The Mitchells note, however, that GMAC has stirred up a great deal of litigation across the country in an attempt to *develop* case law which would benefit GMAC's financial portfolio.

In many cases, "financially strapped debtors" cannot afford to appeal (or defend appeals). The Mitchells can be counted among these debtors. GMAC's expression of sympathy for the financial plight of debtors in support of its request for "certainty" is disingenuous.

3. The "Question Presented" by GMAC to this Court cannot be answered because it is predicated upon an erroneous assumption.

The Question Presented by GMAC assumes that only one universal standard for valuing secured claims must exist. The Question Presented asks this Court to decide which of two standards shall apply to all bankruptcy cases. GMAC demands that this Court choose between the standard used in *In re Balbus* [apples] or the standard used by the Ninth Circuit in this case [oranges]. The assumption that one standard fits all is clearly erroneous in light of the plain wording of the statute and its legislative history. Phrased as it is, the Question Presented can only be answered by saying that neither standard is the universal rule.

GMAC's characterization of the valuation method in *In re Balbus* as "retail" is misleading. "Retail value" is not adopted in *Balbus*, in part because the secured item in *Balbus* is a house. The distinction GMAC emphasizes between retail and wholesale values does not apply to the real estate market. There is no retail-wholesale distinction for used houses in the same sense that there is a retail-wholesale distinction in the market for used cars. Houses are generally sold by private parties who do not have the additional mark-up for profit and overhead that exists when a "retailer" sets prices.

The car industry routinely uses published guides to vehicle values. These guides (eg. Kelley Blue Book) show two values for each car: retail value is the price a dealer would charge an ultimate consumer, and the wholesale value is the price a dealer would pay to obtain the car for resale. By redefining the commonly used term "retail" (Petition for Writ, p. 13, fn. 16) GMAC hopes to equate the valuation method used in *Balbus* with the more commonly used "retail" value which is what a GM car dealer receives, including mark-up for profit and

overhead.

The confusion that would result from the adoption of GMAC's proposed definitions of "retail" and "wholesale" values can be further illustrated. As uniquely defined by GMAC in its Petition for Writ, GMAC's sale of a repossessed vehicle would be simultaneously both "retail" and "wholesale." GMAC disposes of repossessed vehicles by third-party commercial auction to used car dealers. Such a sale is considered "commercially reasonable" under applicable state laws. According to GMAC's definition, this commercially reasonable price is a "retail" value. Yet by its definition, GMAC's sale of repossessed vehicles is also a "wholesale" value because the buyer is a retail dealer.

GMAC is actually proposing that "retail blue book" value is "retail value." GMAC is actually promoting the adoption of a valuation method that would include dealer profit and overhead and which is quite different from the value received in a commercially reasonable disposition of a repossessed vehicle. Yet this method of valuing secured claims is embraced by neither *Balbus* nor the Ninth Circuit's decision in this case.

GMAC is asking this Court to choose either the valuation method used in *Balbus* or that used by the Ninth Circuit; but it is actually proposing a third method which was approved by neither Circuit. If this Court were to adopt the *Balbus* standard, GMAC's confused definitions may inadvertently create the appearance that the "retail blue book" valuation is the same as the *Balbus* standard.

4. **The Ninth Circuit's decision in this case was correct and in accord with the vast majority of reported lower court decisions.**

The Ninth Circuit's decision in this case was correct. It properly considered the broad range of possible "purposes" of valuation such as § 362 Motions for Relief, § 363 Motions for Use, Sale or Lease of Property, and § 1325(a)(5)(B)(ii) Chapter 13 plan confirmations (which was the purpose of the valuation in the Mitchells' case). The Ninth Circuit limited its decision to

the context presented before it, Chapter 13 plan confirmation pursuant to 11 U.S.C. § 1325 (a)(5)(B)(ii).

Furthermore, the Ninth Circuit did indeed consider the "use" of the secured item proposed in the plan and found that the use was a normally expected use of a private automobile which would neither augment nor detract from its intrinsic value.

The Ninth Circuit's decision is also consistent with "the vast majority of reported bankruptcy court decisions" (954 F.2d at 560, Petition for Writ, App. A, p. A-4).

5. The Ninth Circuit's decision in this case was fair.

The Ninth Circuit's decision was fair to both the creditor and the debtors.

By the terms of the decision and the Chapter 13 plan, the creditor retained its lien on the secured claim and became entitled to the full dollar amount it would have received had it repossessed and disposed of the vehicle in a commercially reasonable manner. GMAC became entitled to receive monthly disbursements in an amount necessary to adequately protect its secured claim. And in addition, GMAC would receive *additional compensation* above and beyond the dollar amount of the secured claim — in compensation for receiving payments through the plan instead of a cash lump-sum payment.

Likewise, the Ninth Circuit's decision was fair to the debtors. The debtors had purchased the vehicle more than a year before filing the Chapter 13. The debtors paid $5,000 down and financed the remaining balance. The debtors made the car payments for about one year before encountering financial reversals, whereupon they filed the Chapter 13. While the debtors had no financial *equity* in the vehicle, they certainly had an *equitable interest* in the vehicle due to their considerable monetary investment in it and their reliance on it for transportation. Therefore, it was fair to the debtors to allow them to pay the secured claim and retain the vehicle.

6. The Ninth Circuit's decision in this case lacks the degree of importance required to justify a review by this Court.

Using GMAC's estimate of 225,000 Chapter 13 cases filed last year, it is reasonable to assume that approximately two million Chapter 13 cases have been filed under the Bankruptcy Code. Let us also use GMAC's estimate that fifty percent of these cases involve car loans. If the question is as important as GMAC asserts, it is difficult to understand why the Mitchells' case is the first to reach the circuit court level, considering the million other similar cases in existence since 1979.

The fact that no other circuit has addressed this issue is indicative of the very low level of controversy surrounded this issue. In the extreme position taken by GMAC in this case, it appears that GMAC is manufacturing what it purports to be an important question.

a. Most bankruptcy appeals involve the incremental loss of money by the creditor or debtor, which apply to potentially thousands of cases each year. However, this fact does not require this Court to review each bankruptcy decision for which a writ of certiorari is petitioned.

The purpose of the Bankruptcy Code is to establish a fair and orderly way to discharge certain debts. Accordingly, most petitions for certiorari regarding the Bankruptcy Code involve the incremental loss of money by either the creditor or the debtor. And, in most bankruptcy cases, the monetary loss of the party may apply to thousands of other similar cases each year. However, the fact that many similar cases may exist does not require this Court to accept each bankruptcy case for which a writ of certiorari is petitioned.

b. The dollar amount GMAC asserts that it and other creditors will lose must be measured against their gross income to determine the degree of effect of the Ninth Circuit's decision.

GMAC is the financing arm of General Motors Corporation. As such, it is one of the largest financial institutions in the nation. The Mitchells are unaware of the gross income of GMAC, but the gross sales of GM Corporation in 1990 was $126,000,000,000 (One Hundred Twenty-six Billion Dollars) (*The World Almanac and Book of Facts 1992*, Pharos Books, p. 147).

As a result of the Ninth Circuit's decision in this case, GMAC will lose an additional increment of money in Chapter 13 cases. However, the impact of that increment will probably be fairly insignificant in light of its gross income.

CONCLUSION

For these reasons, the Court should deny GMAC's petition for a writ of certiorari.

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Respectfully submitted,

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